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No. 83-946

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM KEENE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that Florida Marine Patrol officers lacked authority to arrest them and search their marijuana-laden vessel because the vessel was allegedly discovered outside the territorial waters of the State of Florida.

1. After a bench trial in the United States District Court for the Southern District of Florida, petitioners were convicted of possessing marijuana on board a vessel of the United States with intent to distribute it, in violation of 21 U.S.C. 955a.[1] Petitioner Keene was sentenced to 18 months'

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[1] Petitioners also were charged in a conspiracy count under 21 U.S.C. 955c, but the parties agreed to hold a trial on stipulated facts on the substantive count only. After the district court convicted petitioners on that count, the conspiracy count was dismissed. Co-defendant Luis Ignacio Cardozo failed to appear for arraignment and was not tried with petitioners.

imprisonment, all but six months of which were suspended, to be followed by a two-year special parole term. Petitioners Collins, Dampier, and Hatcher each were sentenced to 30 months' imprisonment, to be followed by two-year special parole terms. The court of appeals affirmed (Pet. App. A23).

a. The evidence, which is not in dispute, showed that in February 1981 petitioners attempted to smuggle approximately 11,000 pounds of marijuana into this country. Their scheme was frustrated when Florida Marine Patrol officers discovered their vessel and its illicit cargo off the Florida coast.

On the evening of February 25, 1981, the Florida Marine Patrol vessel ORION was on routine patrol in the Gulf of Mexico off the west coast of Florida near Everglades City. The purpose of the patrol was to enforce federal regulations protecting stone crab areas from shrimp fishing. Pet. App. A3-A4. At approximately 6:00 p.m., monitoring of the ORION's radar disclosed two vessels that appeared to be crossing into the protected area, some 18 miles offshore (*id.* at A4).

The ORION turned off its lights and approached the two vessels. When the ORION drew near the two boats, Officer Minski turned the ORION's spotlight on one vessel and saw burlap-wrapped bales stacked in plain view on its deck. That vessel veered away and the ORION gave chase, shortly thereafter effecting a stop and arresting the vessel's four occupants. Pet. App. A4-A5. The ORION then proceeded after the second vessel, which had disappeared from its radar. At approximately 11:00 p.m., the ORION came upon petitioners' crab boat, the McRICH. It too had burlap-wrapped bales stacked in plain view in its cabin and on its work deck. When Officer Minski turned on the patrol boat's blue law enforcement light and identified himself

over a loudspeaker, the McRICH sped away and took evasive maneuvers. It finally stopped when another officer fired a shotgun blast over the boat. *Id.* at A5-A6.

When the McRICH was stopped, it was five and one-half to six miles off the Florida coast (Pet. App. A7-A9). Petitioners were arrested and were taken aboard the ORION, which then towed the McRICH to Key West. Petitioners' boat was neither searched nor boarded until after it had been brought to Key West (*id.* at A7, A17).

b. Prior to trial, petitioners moved to suppress the marijuana discovered on the McRICH. They claimed that the Florida Marine Patrol officers lacked authority to stop and arrest them and to search their vessel. In a thorough opinion (Pet. App. A1-A22), the district court rejected their contentions on four alternative grounds. The court first concluded that petitioners had no legitimate expectation of privacy in the work deck of the McRICH (*id.* at A10-A14). Alternatively, the court held that no search had occurred since the marijuana bales on petitioners' boat were in plain view (*id.* at A16-A17). The court also ruled that, in any event, the officers did have authority under Florida law to stop petitioners' vessel, since the Florida constitution provides that the State's border extends nine miles seaward (*id.* at A11-A16). Finally, the court held that even if the officers exceeded their authority, suppression was not required because petitioners' arrest could be justified as a citizen's arrest (*id.* at A19-A21). The court of appeals affirmed without opinion (*id.* at A23).

2. Petitioners contend (Pet. 8-19) that the Florida officers lacked power to arrest them on the high seas and that the marijuana discovered on their vessel should be suppressed. The Court has recently declined to review identical arguments (*Hernandez* v. *United States*, cert. denied, No. 83-5625 (Jan. 23, 1984)), and there is no reason for a different result here.

Insofar as petitioners argue that Florida officers could not arrest them on the high seas, it is settled that petitioners would not be entitled to relief even if their arrests were unlawful, for a criminal defendant "cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest." *United States* v. *Crews*, 445 U.S. 463, 474 (1980).

To the extent petitioners are claiming that the exclusionary rule should be applied to suppress the marijuana seized from their vessel by the state officers, that claim also must fail. It is settled that federal, not state, law controls the admissibility of evidence in a federal trial, even when the evidence is obtained by state officers who may have violated state law. See *Preston* v. *United States*, 376 U.S. 364, 366 (1964); *Rios* v. *United States*, 364 U.S. 253, 255, 261 (1960); *Elkins* v. *United States*, 364 U.S. 206, 223-224 (1960).[2] Here, the plain view discovery of numerous bales of marijuana stacked on the deck of petitioners' vessel did not even constitute a "search," and thus the state officers' actions did not implicate the Fourth Amendment at all. Cf. *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983).[3] The discovery of the marijuana, coupled with petitioners' attempt to

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[2]Petitioners rely (Pet. 11-13) on the Fifth Circuit's decision in *United States* v. *Garcia*, 676 F.2d 1086 (1982), for their contrary argument. They overlook the fact that this Court vacated that decision (*United States* v. *Garcia*, No. 82-1549 (June 20, 1983)). On remand, the court of appeals held that a state officer's arrest powers under state law do not govern the admissibility in federal court of evidence discovered in a search that complies with federal law. *United States* v. *Garcia*, 719 F.2d 108, 109 (5th Cir. 1983).

[3]In addition, the district court also correctly concluded (Pet. App. A10-A11) that petitioners had no legitimate expectation of privacy in the open areas of their vessel where the marijuana was observed in plain view. See *United States* v. *DeWeese*, 632 F.2d 1267, 1271 (5th Cir. 1980).

flee from the officers, undeniably furnished the officers with probable cause to arrest petitioners and to seize the vessel and its contents. Moreover, although the district court concluded that the officers did have authority under state law to arrest petitioners, it also concluded in the alternative that the marine patrol officers possessed common law arrest powers. Thus, petitioners' arrests and the search of their vessel were permissible under both the Fourth Amendment and the common law. In short, petitioners have provided no grounds for reversing their convictions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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